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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 153

SAINT LO CONSTRUCTION COMPANY, INC., A Corporation,
Petitioner,

v.

LAWRENCE KOENIGSBERGER, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, Saint Lo Construction Company, Inc., a corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 21, 1949 (R. 232), affirming a judgment of the United States District Court for the District of Columbia, (R. 56). A timely motion for re-hearing was denied on May 4, 1949 (R. 251). The scope of review sought by certiorari is lim-

ited to the application of res judicata denying to petitioner the right of a full defense to certain equitable proceedings brought by the respondents in the District Court to enjoin a singularly adaptable use of private property. *Fayerweather* v. *Ritch*, 195 U. S. 276, 49 L. Ed. 193, 25 S. Ct. 58.

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

A. Statement of Facts.

Petitioner is the owner of a large parcel of land situate on a leading thoroughfare in the Nation's Capital. It consists of the entire frontage on the east side of Connecticut Avenue between Northampton and Oliver Streets, N. W., (See Plat R. 205, 221). Petitioner's locus in quo is a part of a small four block sub-division which was created in 1907 and at that time designated as "Chevy Chase, D. C." Included in the deeds to first grantees of lots in "Chevy Chase, D. C." were the following restrictions in future use of the property thereby conveyed:

> "That any houses upon said premises shall be built and used for residence purposes exclusively, except stables, carriage houses, sheds or other out-buildings for use in connection with such residences; that no trade, business, manufacture or sales or nuisance of any kind shall be carried on or permitted upon said premises. No apartment house or apartment houses shall be erected thereon. . . .".

In 1907, the above vicinage was suburban, if not actually rural, in every sense of the word, with private transportation methods consisting of horse-drawn vehicles (R. 171). For a number of years, the area continued to be used for strictly residential purposes. The petitioner's property during the period of private residential development was accordingly improved by a palatial suburban home considered the show-place of the neighborhood (R. 224). As a result of sudden growth of the city during the period fol-

lowing World War I, Connecticut Avenue emerged a main traffic artery to serve this newly developed northwest section of Washington. To adequately service household needs of this section, the Zoning Commission of the District of Columbia, acting pursuant to public convenience and necessity, established a commercial center at Connecticut Avenue and Northampton Street, directly across from petitioner's property (R. 221). By reason of inexorable trends in the avenue area, the locus in quo eventually was absorbed by the non-residential characteristics of this adjoining property. On September 15, 1941, petitioner's predecessor in title, Ellen T. McReynolds, filed a civil action in the United States District Court for the District of Columbia, alleging these deleterious conditions, and prayed to be relieved of the aforesaid restrictive covenants which unduly retarded the property's eventual conformance to the vicinage. Ellen T. McReynolds prayed affirmatively that the restrictions be judicially annulled and cancelled. After trial, the proceedings were finally terminated by a summary order of dismissal, without findings of fact or conclusions of law which might have indicated the reason for denial of relief (R. 57). By mesne conveyances, the petitioner acquired the locus. As a result of continued deterioration subsequent to the hearing, the building thereon eventually depreciated to an unrentable, vandalic, useless structure which was finally ordered removed by municipal authorities as a common nuisance (R. 185).*

Upon investigation of the prior McReynolds' cancellation proceedings, petitioner was unable to determine the matters and things concluded thereby because of the varied issues and an absence of findings of fact and conclusions of law (R. 58). Petitioner, conceiving it to be the only

* It is unnecessary to repeat in detail the many non-residential usages in the vicinage, including fifty-five business establishments abutting on the west line of Connecticut Avenue, a large active bus terminal, traffic and mechanical parking devices on both sides of the avenue, traffic barricades in front of petitioner's parcel. In the Court of Appeals, it was not disputed "that this was a quiet neighborhood when the covenant was made, but has since become so unsuitable for private dwelling purposes that the injunction makes the lot practically useless to appellant and the community" . . . (R. 229).

method to determine whether the covenants qualified for specific performance, proceeded to tender an appropriate building for evaluation by the subdivisional property owners. At considerable cost, petitioner completed plans and specifications for a structure which might conform to the wishes of the neighbors and the changed conditions of the vicinage (R. 74). The majority of the owners in the subdivision approved the building proposed for the site (R. 176). In a study of the needs of the area, the Zoning Commission of the District of Columbia made exhaustive findings sustaining a public need for petitioner's proposed development (R. 46, et seq.).**

On April 20, 1947, petitioner commenced the construction of a modern air-conditioned apartment building (R. 80), having theretofore received a municipal building permit for the erection thereof (R. 79).

B. History of Case in Lower Courts.

On May 8, 1947, several days after commencement of construction, respondents (plaintiffs) filed a complaint in the District Court seeking to enjoin the erection of petitioner's apartment house (R. 2). The complaint specifically alleged that six years prior thereto, petitioner's predecessor in title had brought proceedings in the same tribunal to annul and cancel the identical restrictions (R. 4). The complaint alleged that the prior proceeding, after a full hearing, was dismissed by the District Court. Answer was timely filed, in which petitioner protested that specific performance of the particular building restrictions would be against equity and good conscience, and denied the applicability of the prior proceedings as in any way determinative of plaintiffs' present demand for injunctive process (R. 13). Issues were promptly joined and the controversy calendared for trial. Abutting property owners sought to intervene under Rule 24, Federal Rules of Civil Procedure, to

** "Where an important public interest would be prejudiced, the reason for denying the injunction may be compelling . . .". *City* v. *Dickey Clay Mfg. Co.*, 289 U. S. 34, 77 L. Ed. 1208, 53 S. Ct. 602, *infra*.

urge that their rights be determined solely on the basis of monetary damages, if any, in lieu of specific performance (R. 29-35). The motion to intervene was denied (R. 36). At pre-trial conference, pursuant to Rule 16, Federal Rules of Civil Procedure, respondents moved for summary judgment or an order limiting the issue to physical changes in the vicinage since the date of the hearing in the prior cancellation proceedings. After lengthy arguments, the motion was denied by the pre-trial judge (R. 37).* Acting under Rule 16, Federal Rules of Civil Procedure, the pre-trial judge directed that trial be had on the broad issue as to whether or not, in the exercise of sound judicial discretion, the building restrictions should be specifically enforced in the light of the presently existing facts and circumstances (R. 41). Several weeks thereafter, the case was brought on before an associate trial judge for hearing on the merits. At the opening of the trial, on brief statements made in renewal of the respondents' previous motion, the trial judge, without ado, imposed the doctrine of res judicata limiting petitioner's defense to evidence relating solely to "physical changes in the neighborhood" since December, 1943, the date of the prior hearing (R. 55).** Throughout

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* In this pre-trial order (R. 39), the reasons for the denial of the motion were stated: "In 1941, defendant's predecessor in title, Ellen T. McReynolds, brought a civil action in this court for the purpose of setting aside, vacating and annulling the covenants. On June 14, 1944, Judge Bailey dismissed the complaint. . . . The plaintiffs . . . say that the action of Judge Bailey is res judicata of this case, and that the only issue which should now be tried is the change, if any, in conditions in that subdivision since June, 1944. . . . Judge Bailey's action to simply dismiss the complaint with no reason given and the case being unreported is not res judicata of the issues here . . .".

** The pre-trial order (R. 225) in the prior case set forth the former plaintiff's contention as follows: ". . . it is entitled to have the restrictive covenant set aside because of changes in the neighborhood and because of changes in the use of properties in the neighborhood, because it would be inequitable to enforce the covenant because of such change . . .". In the answer filed by the defendants to this contention, it was averred "that such change in conditions as may have occurred in the neighborhood *adjacent* to the four squares in question does not provide ground for equitable relief to the plaintiff from the obligation of said covenants . . .". This latter issue was carried forward into defendants' pre-trial order (Orig. Tr. 242). With this divergence of contended issues, it is impossible to conclude whether any evidence of changes in the "adjacent area" was admitted, much less determined in a particular degree.

the trial below the District Court refused to admit evidence of changes which had occurred in the vicinage since the creation of the subdivision in 1907, up to December, 1943, or admit evidence of the many alterations in facts and circumstances which had transpired during a period of some forty years. In addition, the District Court refused to admit in evidence descriptive proofs of the nature of the structure presently sought to be enjoined, or evidence of its effect upon the adjoining property, or the changed views of the property owners in the subdivision in regard to this type of building or the community needs for improvements of the type proposed by petitioner. Tendered proofs were made of all these things, as well as evidence of complete deterioration of petitioner's property to its hopelessly depreciated value (R. 55). The limitation in issues adopted by the District Court permitted the petitioner to place in evidence only such matters as related to *physical* changes in the vicinage occurring since December 1, 1943. In completing its case against the petitioner, the respondents merely placed in evidence the pleadings, pre-trial order and judgment of dismissal in the prior proceedings without any proofs aliunde. The trial was thereupon concluded. The District Judge ruled that petitioner had failed to show *substantial physical changes in the vicinage* since the date of the prior hearing (R. 216). On April 26, 1948, the District Court issued a permanent injunction restricting the future use of the now vacant locus in quo to strictly private, non-multiple residential utilization (R. 56). An appeal was perfected to the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals by divided court affirmed the action of the District Court (R. 225-231). Judge Edgerton in a searching, dissenting opinion held that the District Court, by improperly applying res judicata, had arbitrarily issued injunctive process. Further, the Court of Appeals' separate opinions, directed to the same point, disclose clear uncertainty as to the precise facts concluded in the prior

proceedings,* yet, the controlling opinion imposes collateral estoppel to deny petitioner a full defense on the merits. Because of this anomoly, petitioner promptly moved for a rehearing (R. 247) before a court en banc (Title 28, U. S. C., Section 46). This motion was denied without opinion (R. 251).

C. Federal Rules of Civil Procedure Involved.

Rule 52(a), Federal Rules of Civil Procedure as amended, effective March 19, 1948, provides:

> "a. Effect. In all actions tried upon the facts without a jury, *or with an advisory jury,* the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. *If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion, except as provided in Rule 41(b).*" (Italics indicate 1948 amendments.)

Rule 16, Federal Rules of Civil Procedure, provides:

> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a

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* In the majority opinion (R. 227): ". . . The issue upon which the former action was brought, litigated and determined, was an alleged change in the neighborhood such as to render the covemnt no longer effective. The same issue is the basis for the present action . . .". Compare the dissenting opinion (R. 229) where it is stated: ". . . But it did not, and on the pleadings could not, adjudge that the covenant should be enforced by injunction. What was not adjudged and could not be adjudged did not become res judicata . . .".

conference to consider (1) The simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proofs; (4) the limitation of the number of expert witnesses; (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; (6) Such other matters as may aid in the disposition of the action. The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those disposed of by admissions or agreements of counsel; such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

II.

QUESTIONS PRESENTED.

1. Are findings of fact and conclusions of law, as required by Rule 52 (a), Federal Rules of Civil Procedure, a juridical necessity to the validity and effect of a judgment when it is subsequently asserted (against persons who were not participants) as constituting a thing adjudicated, particularly, where the causes of actions are admittedly different and the factual matters included in the prior proceeding were susceptible of alternate determinations or, in fact, no relevant determination whatsoever; or is compliance with Rule 52 (a) a clear non-essential in determining the efficacy of judicial determinations under federal practice?

2. If considered non-essential, regardless of the Rule, does the absence of findings of fact and conclusions of law require the proponents of a prior judgment, seeking the

bar of res judicata, to establish, aliunde, the precise facts adjudicated where the prior record admits of alternate findings to support the general dismissal of an admittedly different cause of action?

3. May the use of private property be substantially restricted by issuance of a mandatory injunction as a matter of course at the instance of distant owners relying upon restrictive covenants contained in private deeds executed over forty years ago, or must the issuance of injunctive process be made to rest upon the exercise of sound judicial discretion after a full and complete consideration of the relevant facts?

4. Are pre-trial orders entered by the District Court pursuant to Rule 16, Federal Rules of Civil Procedure, binding the District Judge before whom the controversy is subsequently brought on for trial, or may the trial judge alter the trial pattern and pre-trial orders for any cause, irrespective of mutually dependent stipulations extracted from the parties during the course of the pre-trial conference?

III.

REASONS FOR GRANTING WRIT.

A. The Decision of the Court of Appeals Departs From the Accepted and Usual *Course* of Judicial Proceedings and in Doing so Takes Property in Violation of the Due Process Provisions of the Fifth Amendment to the Constitution of the United States.

The controlling point in this case arises as a result of an application of res judicata. It is the position of the petitioner that irrespective of the fact that the litigants herein were before an adequate tribunal, the petitioner was not permitted an adequate defense. Because of this, the precise result of the final act of the District Court was to deprive petitioner of its property without due process of the

law in violation of the Fifth Amendment to the Constitution of the United States. In other words, by improperly adhering to a prior judicial proceeding, the District Court restricted petitioner's defenses so as to be completely deprived of its property. In *Chicago, B & O R.R. Co.* v. *Chicago,* 166 U. S. 226, 236, 41 L. Ed. 979, 985, 17 S. Ct. 581, 584, petitioner's contention with respect to a violation of due process in procedural matters is fully sustained:

> "The mere form of the proceeding, instituted against the former owners, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. . . .".

A substantially debatable question relating to the operative effect of res judicata where its effect is to deprive a litigant of a substantial defense which, in turn, deprives one of property, presents a federal question conferring jurisdiction upon this court. In *Fayerweather* v. *Ritch,* 195, U. S. 276, 49 L. Ed. 193, 25 S. Ct. 58, this point was specifically confirmed:

> "The contention is not that the state courts erred in their finding in respect to this fact, but that there *never was any finding.* . . . (The) giving effect in the circuit court to the state judgment does not change the character of the question. . . . Whether the contention of the plaintiffs in respect to the character of the state proceedings (res judicata) can be sustained or not is a question upon the merits and does not determine the matter of jurisdiction. . . .". (Italics supplied.)

The petitioner does not pretend to discount the essentiality of establishing that res judicata was not applicable in the way the District Court imposed it in denying petitioner's right to defend property rights. The contention, here asserted, must ultimately fail unless petitioner can do this. It is well settled that a litigant cannot set up a defense which has been previously adjudicated against him. The right to due process does not include the privilege to

litigate the same things more than once. *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. In the accompanying brief (Part 6(b) post, pp. 27 *et seq.*), petitioner will show conclusively that the prior litigation which attracted the attention of the Court of Appeals was not res judicata of any matters relating to the proceedings brought by the respondents. If any facts *were* concluded in the prior case, which constitutes pure speculation, the extent and volume thereof were not weighed or considered by the District Court though essential to the proper reconciliation of the private rights of the parties.* The total absence of proofs aliunde descriptive of the facts allegedly determined in the prior proceedings resulted in the District Court issuing a mandatory injunction, arbitrarily and capriciously. (J. Edgerton's dissenting opinion, (R. 230).** By failing to weigh or consider the evidence which was relevant to the exercise of its discretion, the District Court denied petitioner procedural due process of law.

American Toll Bridge Company v. *Railroad Commission*, 307 U. S. 386, 83 L. Ed. 1414, 59 S. Ct. 948.
Railroad Commission v. *Pacific Gas and Electric Company*, 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334.

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* In *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48 L. Ed. 355, 18 S. Ct. 18, the fact concluded was a location map, yet as a piece of evidence it was produced in the subsequent proceeding though its validity could not be questioned. In the present case, no facts were produced or shown to have attained factual determination.

** The trial judge was unmindful of the recent decision of this Court entitled *Hecht Co.* v. *Bowles*, 321 U. S. 321, ... L. Ed. ...., 64 S. Ct. 587 (1944): "We are dealing here with the requirement of equity practice with a background of several hundred years of history . . . Flexibility, rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs, as well as between competing private claims . . .". The theory of automatic injunction was rejected as not within the purview of congressional intent. Refer to *Stewart* v. *Finklestone*, 206 Mass. 28, 92 N. E. 37, *Levi* v. *Worcester Railway Company*, 193 Mass. 116, 78 N. E. 853, rejecting automatic injunction in reference to restrictive covenants. Refer to *City* v. *Dickey Mfg. Company*, 289 U. S. 334, 77 L. ed. 1028, 53 S. Ct. 602, *supra*, where Justice Brandies condemned injunctions issued as matter of course in restraining nuisances per accidens.

In *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535, Mr. Justice Lamar, speaking for the Court, said:

> "For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order, as well as to the notice and hearing which preceded it. . . . the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. . . .".

To the same effect under the state decisions, *Hite* v. *Hite*, 124 Cal. 389, 57 Pac. 227, 45 A. L. R. 793, 71 Amer. St. Rep. 82; *McNamara* v. *McNamara*, 86 Neb. 631, 126 N. W. 94, 27 L. R. A. (N. S.) 1062, 21 Amer. Cas. 451. The petitioner is confident that it can demonstrate that the judicial proceeding held below, whereby petitioner's property was taken,* lacked the fundamental attributes of a judical proceeding. It constituted a judicial usurpation in violation of petitioner's constitutional privileges. By inadvertently resorting to res judicata, to paraphrase the celebrated statement of Daniel Webster, the proceedings below "Condemned before it heard". (*Dartmouth College* v. *Woodward*, 4 Wheat, 518, 4 L. Ed. 629).

B. This Case Raises Several Important Questions of Federal Procedure Which Have Not Been, But Should be, Settled by This Court.

The judgment of dismissal in the former proceeding (R. 57) was entered without supporting findings of fact and conclusions of law in disregard of the mandatory provisions of Rule 52 (a), Federal Rules of Civil Procedure. The pleadings to which the judgment related admitted of sev-

* To require an owner to cease using property for certain purposes is a "taking" of property and he may appeal to constitutional safeguards as fully as if the title, itself, were taken. *Council of Wilmington* v. *Turk*, 129 A. 512, 14 Del. Ch. 392; *Euclid* v. *Ambler Realty Company*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct. 114. A "taking" under zoning regulations was held to violate the Fifth Amendment in *Bugher* v. *Gottwals*, 60 App. D. C. 340, 54 Fed. (2), 451. This latter case turned upon vicinal usages identical with those affecting petitioner's property.

eral distinct and highly contested propositions relevant to the relief and proofs available to the litigants. In Part 6 (b), Supporting Brief, several distinct and different grounds of dismissal are demonstrated to have been present, any one of which would have amply supported the former judgment. Still, the Court of Appeals by mere examination of the pleadings, pre-trial orders,** without more, held that the prior judgment of dismissal is res judicata of a certain "basic issue"; namely, that as of December, 1943, changes in the characteristics of the neighborhood were *insufficient* at that time to warrant denial of specific performance, assuming without basis that such an issue was then before the court. The Court of Appeals then holds res judicata to be applicable in a subsequent proceeding of an entirely different nature to the extent of this determination of *insufficiency,* and this, without definite proof that such a prior determination had in fact been made, or was required to be made. In so holding, the Court of Appeals endowed the prior pleadings with a greater latitude of factual finality than the issues themselves admitted.

In the event of non-compliance with Rule 52 (a), does a judgment extend its effect to every conceivable factual matter which may, or may not, have been considered by the trier, and thus extend a bounty to respondents for non-compliance with statutory rules of federal procedure? The respondents were the prevailing parties in the prior proceeding in which Rule 52 (a) was violated. They are now granted every presumption, speculative as they are, with respect to the factual matters. The respondents receive more factual benefits than would have followed compliance with the rule. The Court of Appeals bestows more force

** The Court of Appeals relies upon the pre-trial order in the former proceeding as disclosing the issues, yet the same pre-trial order repeats the defendants' contentions contained in their answers, that the relief sought is not available to the plaintiff as prayed (Orig. Tr. 496). Significantly, in this instant case, the pre-trial order was ignored by the trial judge. Little stability seems to adhere to pre-trial orders. Quaere: In *this* case by following the rule of the Court of Appeals a similar absence of proofs would lead to determinations which are contrary to fact.

on the prior judgment than it would have upon a direct appeal therefrom. In *Bank of Madison* v. *Graber*, 158 Fed. (2) 137 (CCA-7), a reversal was entered solely for failure to comply with Rule 52 (a), the Court saying:

> "These are strongly worded, mandatory provisions which should be respected. They are not meaningless words. . . We see no reason why the rule which requires findings of fact should be treated any different than a statutory provision containing the same requirement. . ." (Citing *United States* v. *Causby*, 332 U. S. 256, —— L. Ed. ——, 66 S. Ct. 1062.)

It is clear that the very judgment, which the Court of Appeals now extends such an expansive scope, would have been invalidated on appeal for these very same reasons, and for the additional reason that because of a lack of findings, the appellate body would be unable to determine the precise nature of the controversy before them. Are strangers in fact to the judgment required to ascertain more than the appellate tribunal? Shall strangers be bound by determinations which an appellate court would refuse to concede for purposes of review? To assert the proposition, is to answer it.

It is true that findings of fact have been a part of equity practice and procedure for years before adoption of the Federal Rules, but it is equally true that the recent mandate was adopted to accomplish a fuller compliance to effect an improvement of federal procedure. With reward, rather than penalty, little, if any, improvement may be forecast for the future. In the report of the Advisory Committee on Rules of Civil Procedure (5 Federal Rules Decisions 471), the following statement is found:

> "Findings of fact aid in the process of judgment and in defining for future use the precise limitations of the issues and determinations thereon. Thus, they not only aid the appellate court on review, *Hurwitz* v. *Hurwitz*, 136 Fed. (2) 796, 78 U. S. App. D. C. 66, but they are an important factor in the proper appli-

cation of the doctrines of res judicata and estoppel by judgment. . . ."

It would seem to be of importance to bench and bar that the meaning of the mandate contained in Rule 52 (a) be finally settled by decision of this Court. In many of the circuits, compliance seems co-extensive with validity of the judgment. Nordbye, J. 8th Circuit Judicial Conference 1 Federal Rules Decisions 25; *United States* v. *Fifty-Nine Tubes,* 32 Fed. S. 958. While in the Court of Appeals for the District of Columbia Circuit, non-compliance would seem to have little effect, regardless of the use to which the adjudication is sought to be employed. Refer, also, to *Gill* v. *Gill,* 147 Fed. (2) 154, 79 U. S. App. D. C. 357.

Also of interest to the legal profession is the propriety of the trial judge in the District Court in repudiating one of the principal pre-trial rulings entered of record at pre-trial conference several weeks before hearing on the merits (R. 38). Although petitioner limits the scope of its application for a writ of certiorari to rulings by the Court of Appeals on the question of res judicata, the action of the District Court in respect to Rule 16 substantially relates to the same point in that the pre-trial judge in the court below, after full consideration of extensive briefs and lengthy arguments, decided that res judicata *did not apply.* Based upon this ruling, petitioner thereafter entered into a number of stipulations to facilitate trial on the merits pursuant to the purposes of pre-trial procedure. These stipulations were dependent upon due compliance by all persons with the settled pattern. The trial judge's abrupt alteration in the pattern of trial (R. 60) completely deprived petitioner of an orderly and a complete record within the scope of the pre-trial order. This action was in direct violation of Rule 16, Federal Rules of Civil Procedure:

". . . The court shall make an order which recites the action taken at the conference . . . and such order when

entered controls the subsequent course of action unless modified at trial to prevent manifest injustice. . . .".

A mere perusal of the transcript of evidence will disclose the difficulties which confronted petitioner in the proper defense of these injunctive proceedings. Petitioner appeared on the day set for trial fully prepared to proceed in accordance with the pre-trial pattern, accompanied by multiple expert witnesses, technical research data, and other material prepared at considerable expense—all of which proofs were summarily rejected by the trial judge. It is idle to contend that petitioner should have asked for a continuance. Moreover, a continuance, if granted, could not validate the District Court's refusal to abide by its own agreement. Availability of trial dates, witnesses and engagements of counsel invariably compel litigants to go forward on trial dates previously specified. It is earnestly felt that if this Court permits the course of procedure which was followed in this case to pass without notice, as was done by the Court of Appeals, a condition of affairs may develop which might completely defeat the purposes of Rule 16. Stipulations and concessions made by counsel at pre-trial are dependent things which must be accorded a degree of stability by the District Courts, if the operative effect of Rule 16 is to achieve any of its desired objectives. Rule 16 says that when "such order (is) entered (it) controls the subsequent course of action. . . .". In these words, the pre-trial order controls all procedural matters, entitling litigants to prepare for trial in accordance with its terms. If District Courts are permitted to ignore its provisions at will, litigants will soon consider conferences thereunder mere gestures. Regardless of what may be the ultimate decision of the trial judge, all proofs, stipulations, concessions, and rulings made in respect thereto, contained in the pre-trial order must, in order to give effect to Rule 16, prevail. Pre-trial orders are binding upon the litigants. *Geopulos* v. *Mandes,* 35 Fed. S. 276; *Fowler* v. *Crown-Zel-*

lerback Corp., 163 Fed. (2) 773 (CCA-). The same force makes them binding upon associate judges of the District Courts. The violation of Rule 16, denied petitioner procedural benefits assured it by virtue of statutory rules of court.

C. The Opinion of the United States Court of Appeals for the District of Columbia Circuit Unduly Jeopardizes Future Application of Rules of Law Relating to Collateral Estoppel by Not Giving Proper Effect to Applicable Decisions of This Court.

The necessary result of the majority opinion of the Court of Appeals, if permitted to remain the law of this case, is that *certainty* as a controlling factor in the application of collateral estoppel is completely eliminated insofar as the law of the District of Columbia is concerned. A long line of decisions by this Court assiduously followed by all the Circuit Courts of Appeals have repeatedly held that "certainty to a certain intent" is inherent in the doctrine of collateral estoppel. Such a precautionary factor is adopted to prevent abuses of constitutional guarantees of due process and administration of justice. *Angel* v. *Bullington*, 330 U. S. 185, 91 L. Ed. 832, 67 S. Ct. 659. Prior to the decision in this case, the Court of Appeals has consistently dwelt upon the necessity of certainty as clearly announced in *Russell* v. *Place*, 94 U. S. 606, 24 L. Ed. 214, — S. Ct. —. For examples thereof, refer to Judge Stephens' opinion in *Brown* v. *Brown*, 122 Fed. (2) 219, 74 U. S. App. D. C. 309; *Vincent* v. *United States*, 76 Fed. (2) 428, 64 App. D. C. 178. In the *Russell* case, this Court speaking of collateral estoppel, said:

> ". . . Estoppel must be certain to every intent, and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered in evidence . . ."

In the instant case, everything is left to conjecture. But aside from this point which is developed more fully in the Supporting Brief, Judge Edgerton states that the pivotal issue itself was never before the Court at any time (R. 230). The wording of the dissenting opinion is strikingly similar to that contained in *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 66 L. Ed. 708, 42 S. Ct. 363:

> "The issue whether the restrictive clauses were valid in view of the provisions of the Clayton Act concerning machinery patented or unpatented was not and could not have been involved or decided in the former suit . . ."

Be that as it may, the most striking feature, susceptible of producing many adverse results beyond the personal rights of petitioner is the fact that within the cover of the two opinions of the Court of Appeals, there is present grievous uncertainty which extends to the very point which, under the *Russell* decision, prevents employment of collateral estoppel to restrict in any manner a person's right to an adequate hearing. Petitioner is compelled to conclude that the decision of the Court of Appeals fails to qualify as a real contribution to our body of the law. To the bench and bar, it will contribute at best nothing except possible confusion. To the scholar, it will constitute an insurmountable problem in the field of legal coordination.

It has been repeatedly held that all doubts in the interpretation of restrictions upon the free use of property are resolved in favor of the fee-simple owner. *Ewertson* v. *Gerstenberg*, 186 Ill. 344, 57 N. E. 1051. Yet, this presumption, concededly applicable to the facts in this case, seemingly loses its force when exposed to an admixture of judicial investigations. As a result of the decision below, here lies petitioner's vacant land, a useless fee-simple estate, clothed in funereal habiliments of doubt.

IV.

CONCLUSION.

The issues raised by the petitioner are important in several prominent particulars which relate to the administration of justice in federal courts and, in addition, the uniformity of decisions in the application of fundamental principles of law, yet they are so simple and clear cut that this Court could render a final determination without extended argument or, indeed, any argument whatsoever.

WHEREFORE, it is respectfully prayed that the petition for a writ of certiorari be granted, and the United States Court of Appeals for the District of Columbia Circuit ordered to remand the case for a proper trial on the merits.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

OPINIONS.

The opinion of the District Court (Letts, J.) was delivered orally at the conclusion of the hearing (R. 215), but is not officially reported. The opinion of the Court of Appeals (Circuit Judges Clark, Prettyman, concurring; Circuit Judge Edgerton dissenting) was filed February 21, 1949, and appears in the record at Pages 225, et seq. It is reported in 174 Fed. 25; — U. S. App. D. C. —

2.

JURISDICTION TO REVIEW.

The Supreme Court of the United States has jurisdiction to review a decision of the United States Court of Appeals for the District of Columbia Circuit by virtue of the provisions of Title 28, United States Code, Section 1254 (62 Stat. —, Ch. 646, June 25, 1948, effective September 1, 1948), consolidating Sections 346, 347, Title 28, United States Code, 1940 Ed.

3.

STATEMENT OF THE CASE.

A statement of facts material to a consideration of the case is made in the annexed petition ante pp. 2, et seq. under the caption Summary Statement of Matters Involved to which reference is made. Such extensions of facts as appear to be relevant will be shown where necessary and appropriate.

4.

ERRORS TO BE URGED.

(a). The Court of Appeals erred in holding that the order of dismissal entered in the prior proceeding brought by petitioner's predecessor in title to annul certain covenants restricting the use of private property, which order

was unaccompanied by findings of fact and conclusions of law pursuant to Rule 52 (a), Federal Rules of Civil Procedure, indicating the reasons for dismissal, constituted res judicata to deprive the new owner of the property the privilege of a defense to certain injunction proceedings subsequently brought to enjoin the erection of improvements to the said property. This was error for the reason that the prior adjudication related to an entirely different cause of action in which the facts allegedly foreclosed could not have been considered therein, or if considered at all, were considered in different degrees. In any event, in the absence of proofs aliunde indicating the determinations made nothing was foreclosed therein which could later prevent subsequent owners of the property from showing as a matter of law that an injunction constitutes an arbitrary, capricious act in deprivation of private property. By refusing to extend the privilege of defense, the Court of Appeals issued mandatory injunctive process as a matter of right.

(b). The Court of Appeals failed to apply the rule established in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 92 L. Ed. 673, 68 S. Ct. 715, with respect to the limitations upon res judicata where the issues are of a changing, altering nature. This was error in any view of the case for the reason that the Court of Appeals in both the majority and minority opinions concede the changing, altering condition of affairs, and the definite discriminatory result flowing from strict application of res judicata.

(c). The Court of Appeals erred in not holding that the pre-trial order entered in the District Court pursuant to Rule 16, Federal Rules of Civil Procedure, which extended to the petitioner-defendant the privilege of defending its property rights, controlled the procedural course of the trial. Therefore, the action of the trial judge in refusing to subscribe to its terms was clear error which deprived the petitioner of valuable rights under Federal Civil Rules.

5.

SUMMARY OF ARGUMENT.

Res judicata was applied by the Court of Appeals to prevent petitioner's defense of its property rights by restricting its proofs to evidence merely of physical changes in the vicinage since the date of a judicial hearing held some four years prior thereto. The effect of the application of res judicata was such as to deprive petitioner of each and every opportunity to establish that the injunction sought to be issued constituted an arbitrary and capricious exercise of judicial power. Deprived of these privileges, the injunction was issued as a matter of right or as a matter of course, the Court thusly refusing to exercise discretion or consider evidence of countervailing equities. In the former judicial proceedings, the cause of action was clearly different, as were the issues; nevertheless, the Court of Appeals applied collateral estoppel regardless of the absence of proofs aliunde. In the former hearing, the final adjudication consisted of a general decree of dismissal without findings of fact or conclusions of law as required by Rule 52 (a), Federal Rules of Civil Procedure. The respondents (proponents of the prior order of dismissal) made no effort to establish that the facts allegedly adjudicated had in fact been determined, or to sustain the burden in that regard. The petitioner, as a result, was denied procedural due process in the defense of its property rights in direct conflict with the decisions of this Honorable Court.

ARGUMENT.

(a) The Rule With Respect to Collateral Estoppel to Foreclose a Factual Examination in a Subsequent Proceeding.

Res judicata is a generic term. In considering the effect of adjudications, the rule of finality operates within the limits of two well defined sub-classes. Proscriptions upon the scope of proofs in subsequent actions between the same parties where the causes of action are different depends entirely upon the doctrine of collateral estoppel. *Kelliher* v. *Stone and Webster*, 75 Fed. (2) 331 (CCA-3); *Brown* v. *Brown*, 122 Fed. (2) 219, 74 U. S. App. D. C. 309 (J. Stephens writing); *United States* v. *Eliopoulos*, 158 Fed. (2) 206 (CCA-2) (J. Hand writing); *American Trust Company* v. *Butler*, 47 Fed. (2) 482 (CCA-5) (J. Sibley writing). All of these decisions follow the rule in *Russell* v. *Place*, 94 U. S. 606, 24 L. Ed. 214; *De Sollar* v. *Hauscome*, 158 U. S. 216, 39 L. Ed. 956, 15 S. Ct. 816; *Larsen* v. *Northland Transportation Company*, 292 U. S. 20, 78 L. Ed. 1096, 54 S. Ct. 584 and, more recently, *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 92 L. Ed. 673, 68 S. Ct. 715, *supra*, where this Court says:

> ". . . When the second action between the same parties is upon a different cause and demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. . . ."

In *Russell* v. *Place*, *supra*, this Court imposes a rule of *certainty to every intent* in applying collateral estoppel, saying:

> "To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit *could not have been rendered without deciding that matter.* . . . The record of that action does not disclose the nature of the infringement for which damages were recovered . . . it is left to conjecture what was in fact litigated and determined. . . . According to Coke, an estoppel must be certain to every intent, and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered as evidence. (Italict supplied.)

The majority opinion of the Court of Appeals concedes that the two causes of action were different, saying: "Even if it be held that the present cause of action is not the same as that in the former suit . . . nevertheless, the basic issue in both is the same . . ." (R. 226). The dissenting Judge concurred with the datum but rejected the conclusion reached with respect to any similarity of issues. (R. 229). Clearly, the problem of collateral estoppel cannot be solved by reference to basic issues when the relating causes of action are admittedly different. It is solved first by ascertaining if the particular matter was necessarily in issue and, secondly, if the prior order of dismissal "*could not have been rendered without deciding*" such an issue. Basic issues are not the test in collateral estoppel. In estoppel, the litigant is granted the protection of certainty to a certain intent that the alleged facts were surely concluded. It is submitted that the Court of Appeals failed to extend this protection to the petitioner. If petitioner can show that the factual matters in the prior controversy either could, or could not, have been determined, or the order of dismissal could have been rendered with reference to alternate grounds, then, under the decisions of this Court, collateral estoppel is not applicable.

In the *De Sollar* case, the matter of a basic issue was not deemed to be the controlling factor in any degree, the court saying:

> "Now it is of the essence of estoppel by judgment that it is certain that the *precise fact* was determined by the former judgment . . . or be shown by extrinsic evidence that the precise question was raised and determined in the former suit . . . It is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record . . . the verdict does not specify upon which the jury acted, there can be no certainty that they found one rather than the other . . ." (Italics supplied.)

In the *De Sollar* decision, this Court held that "authority of the agent" in the prior proceeding constituted a basic issue, yet the verdict might well have turned on a matter of damages. With this doubt, collateral estoppel in reference to the agent's authority was denied in the second proceeding to permit proofs in that regard to remain open. Likewise, the District Judge who dismissed the former complaint to annul and cancel the restrictions might well have done so on the ground that changes in the neighborhood, regardless of the extent thereof, were not controlling. (Refer to Part 6(b) hereof for argument on this point.) He may have, in fact, excluded all evidence in relation to such changes. As in the *De Sollar* case, the District Judge could have dismissed the cause for the reason that persons seeking equity must do equity and a refusal to pay damages to abutting owners warranted a refusal of relief.* In any appraisal of the former proceeding, there is real doubt that the District Judge determined the extent, volume or sufficiency of changes in the neighborhood. If such doubt exists, it must be removed by proofs aliunde.

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* Indeed, this may have been the precise ground for dismissal for we find these same owners intervening in the later proceedings seeking damages for any impairment of light and air, but otherwise agreeable to adjustment of building restrictions. (R. 29, et seq.)

The earlier District Judge did not attempt to eliminate this doubt by compliance with Rule 52 (a), Federal Rules of Civil Procedure. If findings of fact and conclusions of law had been made, these difficulties, conjectures and doubts would not have arisen. Without such compliance, the doubts remain. The respondents were parties to the prior proceeding while the petitioner was a stranger in fact. An obligation rested upon respondents to comply with Rule 52 (a) or, at least, resort to proofs aliunde.* They refused to produce such proofs (R. 59) because, as the dissenting Judge holds, they could not do so. Perhaps the most decisive language to be found in the state reports bearing upon the subject under discussion is that contained in *Hull* v. *Vaughn,* 23 Tenn. 448, 134 S. W. (2) 206:

> "It is not enough that the question was in issue in the former suit. It must also appear to be precisely determined. *Where in the answers various matters of defenses are set forth,* some of which relate to the maintenance of the suit, and others to the merits and there is a general decree of dismissal, it is impossible to hold the decree a bar to future proceedings . . . if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel, . . ." (Italics supplied.)

(b) The Pleadings, Contentions and Issues With Respect to the Prior Proceedings, Considered Together, Fail to Constitute a Matter of Estoppel to Prevent Judicial Examination of Factual Matters Tendered by Petitioner in Resisting Injunctive Process.

In the prior proceeding, Mrs. McReynolds, the owner of locus in quo, sought to remove a cloud from the title, by an affirmative judicial decree which would cancel and annul the restrictive covenants set forth in the Statement of

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* In *Owensboro* v. *Cumberland Telephone Company,* 230 U. S. 58, 57 L. Ed. 1389. 33 S. Ct. 968: ". . . The bar of the former judgment is, therefore, confined to the questions which were actually litigated and decided in the former case, and it devolved upon the city to show it in support of its plea . . . that the point here in issue was adjudged in the former case . . .".

the Case. This plaintiff deemed the restrictions *invalid* by virtue of many changes in the characteristics of the *restricted area,* as well as similar changes in the *adjacent areas.* In other words, Mrs. McReynolds contended that as the restrictions were conceivably ineligible for specific performance, a fortiori, a court of equity might well *cancel* them. This contention was contested by Zarin and the other defendants * and not without ample authority in support thereof. In *McClure* v. *Leaycraft,* 183 N. Y. 36, 75 N. E. 961:

> "A court of equity will not do an inequitable thing. . . . It cannot set aside a binding contract, but when the effect would be inequitable . . . it refuses to enforce the contract."

In *Fidelity Title and Trust Company* v. *Lomes and Nettleton Company,* — Conn., —, 5 A. (2) 700:

> "There is also the difference already noted between refusing to enforce the contract in an inequitable manner and making a new contract for the parties. . . ."

To the same effect, *Bickell* v. *Moraio,* 117 Conn. 176, 167 A. 722; *Osius* v. *Barton,* 109 Fla. 556, 147 So. 862. Under these authorities, building restrictions might be cancelled by decree where it appears that the beneficiaries have altered the contract by acquiescence in changes within the legal orbit of the covenants. In this respect, it is held that changes in usages outside the orbit are not a controlling factor. *Osius* v. *Barton, supra.* If we assume, as we must, that these former defendants thereafter maintained their contentions, then, in the absence of a showing to the contrary, we must infer that the chancellor at some point in

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* In the principal answer filed by Jacob Zarin, he, together with some 73 intervening property owners, protested. "That such change in conditions as may have occurred in the neighborhood adjacent to the four squares in question (restricted area) does not provide ground for equitable relief to the plaintiff from the obligations of said covenants." (Orig. Tr. 484, 5.) It was conceded in the courts below that the plaintiff merely intended to prepare for a sale as an apartment site. No structure was therein tendered for consideration or evaluation.

the trial was called upon to render a decision with respect to the extent of proofs admissible in evidence. Surely, it must be concluded that the court's ruling in this regard was in conformity with the then prevailing rules of the Court of Appeals of the District of Columbia.* Under these circumstances, it is a reasonable inference that the District Court restricted evidence to changes *within* the restricted area which were considerable. (R. 208-211). However, in quality, these latter changes may well have been considered less severe than in the areas outside the subdivision. The chancellor dismissed the complaint without stating reasons. By this judicial act, the District Court could only have adjudicated that the restrictions were not eligible for cancellation; i. e., they were not invalidated by the shown changes which have occurred within the legal orbit of the covenants. This, possibly, upon the basis that these less severe changes did not disclose a complete obliteration of purposes. But can it be said that the chancellor determined any further factual matters, such as the extent of changes outside the area or the effect which these latter changes might have upon a direct request for specific performance of the covenant?**

Whether one agrees, or not, with the above theory that changes outside the restricted area are irrelevant in a cancellation suit, in the light of specific contentions of the former litigants, it cannot be denied that the question was then before the court. Under such circumstances, the extent of changes which the court might have considered

* Under stare decisis, the District Judge was bound to follow *Grady* v. *Garland*, 89 Fed. (2) 817, 67 App. D. C. 73, where similar affirmative relief was refused on the showing of many alterations outside the restricted area. The dissenting opinion in this case leaves no doubt as to the limitation of evidence. But compare *Castleman* v. *Avignone*, 12 Fed. (2) 326, 56 App. D. C. 253, where alterations in the vicinage are relevant in a defense to specific performance proceedings.

** In the Court of Appeals, dissenting Judge Edgerton says: "The complaint in the former suit asked the court to cancel the covenant. The court dismissed the complaint without giving reasons. No doubt it thereby adjudged the covenant valid (Not subject to annulment). But it did not and on the pleadings could not adjudge that the covenant should be enforced by injunction . . .". (Portion in parenthesis supplied.)

therein is a matter of conjecture. In the absence of findings of fact, this conjecture is accentuated to a point of sheer mysticism. To say that the aggregate of changes in the neighborhood was weighed and judicially determined is to do nothing more than to speculate. Speculation of this nature was completely rejected by this Court in *Dennison* v. *United States,* 168 U. S. 241, 42 L. Ed. 453, 18 S. Ct. 57:

> "There is no finding of fact in connection with this plea (res judicata) and we can only judge of what the issue was by reading the opinion of the court of claims. . . . From this opinion, it appears that the items of the account were not passed upon in detail, but the court rendered judgment in favor of the claimant upon the ground that the approval of account by the district court . . . threw upon the government the burden of disproving the correctness of the several items. . . ."

Nevertheless, without aid of any opinion, or other guide, the Court of Appeals in the instant case holds that the petitioner is bound by what transpired in these former proceedings to the following expanse, viz; that as of December 1, 1943, the *changes in the uses of properties in the vicinage of the locus in quo were insufficient* to deny specific performance or to decree cancellation of the restrictions as of this date.* It is significant that one must resort to a process of deduction to determine the exact factual matters which the lower courts contend were concluded. In neither of the courts was any specification made of the negative matters falling under res judicata which,

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* Dissenting Judge Edgerton places his decision upon firmer ground, namely, that even if the chancellor had considered all of the changes in the entire area, they were merely weighed for the purpose of determining a cancellation thereof. In matters of specific performance, the weight of the evidence may well have been sufficient to deny injunctive process even in 1943. This latter question was not before the court accords Judge Edgerton. "Even had the two cases been before the Court the same day", the disposition would have been different. *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, ... L. Ed. ...., 68 S. Ct. 793; *Ash Sheep Company* v. *United States,* 252 U. S. 159, 64 L. Ed. 507, 40 S. Ct. 241.

itself, belies application of the doctrine.** Moreover, petitioner hesitates to speculate upon the degree of insufficiency thusly determined, or to speculate upon the quantity thereof, computed and assessed as of December, 1943. It would appear that the sum of all changes in the vicinage, if judicially determined on this date, would be an important factor in any view of the case. And this, for evaluation thereof in conjunction with subsequent changes which admittedly occurred. The Court of Appeals concedes that *some* changes occurred since December, 1943, by saying: "It is said that the holding of the District Court that there is no evidence of substantial change in the neighborhood since December, 1943, was clearly erroneous, and, thus, reversible error. . . . We do not see how the court's finding can be held *clear error*. . . ." The minority opinion held that these subsequent changes were substantial in every sense. In any event, there were changes, which, if added to the factual situation of December, 1943, would undoubtedly, if considered together, have tipped the scales of discretion against issuance of the injunction. The District Court in this case did not have at its disposal the conditions which existed as of December, 1943, to tack onto the later changes. More strangely, it refused petitioner's own proffer to establish by evidence aliunde these things (R. 62). If argument were rested at this juncture, it is clear that a mandatory process was issued in violation of procedural due process. Out of this strange admixture of different causes of action emerges a sharp and striking anomaly—an injunction issued as a matter of course which prevents erection of a structure that the District Court refused to view or examine (R. 87), yet a structure which is admittedly

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** The Court of Appeals relied upon *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 42 L. Ed. 355, 18 S. Ct. 18; *Cromwell* v. *County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *The Evergreens* v. *Nunan*, 141 Fed. (2) 927 (CCA-2), Cert. Denied 323 U. S. 720, 89 L. Ed. 579, 65 S. Ct. 49, but it is apparent that in these decisions the matters concluded were specific, ascertainable and definite. In the *Southern Pacific*, it was a "location map," in the *Cromwell* case, a "security bond", the *Evergreen*, the "value of cemetery lot",

proper for the area.* Surely, it was never imagined res judicata be employed as an instrument of contrivance to deprive a citizen of its day in court to adduce evidence to guide a chancellor in the exercise of discretion. To permit res judicata to so operate is to deprive one of private property without due process of law.

Assuming, *arguendo*, that res judicata warranted limitation of evidence in regard to the matters and things occurring prior to December, 1943, nevertheless, the District Court denied petitioner procedural due process by a further limitation of the evidence to *physical changes* in the neighborhood since December, 1943 (R. 55). By so doing, petitioner was prevented from establishing the deterioration of its own property since the prior hearing, as well as the newly expressed wishes of the municipality, the views of property owners in the restricted area and many other things representing "new facts which may have altered the legal rights and relations of the litigants. . . . *Hurd* v. *Albert*, 214 Cal. 15, 3 P. (2) 545. Not alone did petitioner succeed in showing "substantial changes" to the satisfaction of the dissenting Judge of the Court of Appeals (R. 230), but it could have, if given the opportunity, shown an alteration of many other matters in overwhelming proportion. At this second juncture, it may be pointed out that if these other factual things had been weighed by the chancellor, they could very well have tipped the scales to a position where specific performance would have been unwarranted. Moreover, the limitation of *substantial* changes is subject to the same criticism. It is clear that we do not know the balance of the scales as of December, 1943, so, therefore, who can say that a *slight* change may not have five years later tipped the scales in petitioner's favor? The District Court again refused to employ this method of weighing equities, though vigorously importuned.

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* Judge Edgerton (R. 230): "I think it more likely that the building would increase the value for residence purposes of those lots, because it would screen them from Connecticut Avenue. But, this is not for us to decide. The District Court should consider it, along with all other relevant circumstances, in exercising its discretion . . .".

(c) The Alterations in the Factual Circumstances, Legal Principles Involved, Together With Matters of City Planning as Well as the Incongruity Which Results From Strict Adherence to Res Judicata is Sufficient Basis for Application of the Rationale Recently Announced by This Court.

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, L. Ed. 673, 68 S. Ct. 715, *supra*, the strict rule of res judicata was rejected by this Court under the following circumstances:

> ". . . A subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete . . . if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case."

Petitioner is aware that the rationale announced in this decision is not to be employed to cast away completely the well established doctrine of res judicata. Public policy demands retention of res judicata in matters of a static nature but a rationale which recognizes a countervailing policy in matters of a moving, changing nature conforms to reason. The principle in the *Sunnen* case was applied to a taxpayer's status but is equally applicable to any condition of affairs where the "set of events" or the "bundle of legal principles" are of a developing nature. It is felt that in any view of the instant case, petitioner has brought itself within the scope of the Sunnen principle and the Court of Appeals was in error in holding that "We see no escape from . . . res judicata . . ." (R. 226) With the admitted changes in the neighborhood and the many other factual matters which altered the nature of controversy, as well as the doubts inherent in the legal significance of the different causes of action, the Sunnen principle would, if applied, have bestowed a degree of validity to the proceedings below. By failure to do so, the Court of Appeals

permits its decision to remain open to contention that petitioner has been denied procedural due process of law in the defense of its property rights. Some four years had transpired since the prior decision and more than eight and one-half years since the issues had been formulated. In the meantime, the Nation's Capital had grown beyond all expectations to the eighth largest city in the land. Almanac 1949, Farrar Straus and Company. Public needs for multiple housing accommodations within the city had increased to a point of critical acuteness. An expanded population confronted with war-time rationing of building construction had forced the Nation's Capital into the acute classification. It was not until arrival of the post-war period that these accommodations could adequately be supplied by private enterprise with the development of multiple unit structures designed for the major arterial highways comparable to Connecticut Avenue (R. 102).* These things prompted the Zoning Commission of the District of Columbia on November 21, 1945, to revise the classification of petitioner's property to permit, in the furtherance of public interest, the erection thereon of an apartment-commercial development. On this date, the Zoning Commission made extensive findings with respect to public demands for developments of this type and the acute deficiencies in regard thereto (R. 47). Since the former proceeding, the subdivisional owners altered their views in deference to public convenience and necessity (R. 176). The majority of the altered economic conditions occurred since December, 1943, and definitely since the commencement of the post-war building program (R. 95). We find Connecticut Avenue changing markedly from year to year. Traffic, commercial alterations, classes and types of tenants and many other things alter in considerable extents within relatively short

* The present system of civic planning designates Connecticut Avenue from Florida Avenue to the District Line as an apartment house area with commercial islands spaced one-half mile apart at Calvert, Ordway, Albemarle Streets, Nebraska Avenue and Northampton Street, the islands include both sides of the avenue for shopping needs of the respective areas (R. 135). An official of the United States Public Roads Administration testified (R. 140): "There is a perfect pattern of them, and this fits right into that pattern perfectly. They are approximately one-half mile apart."

periods of time. In fact, within the space of a mere five years, petitioner's dwelling depreciated to a common nuisance. Similar instances of residential depreciation will occur in the near future (R. 219). With the city developing so rapidly, areas similar to the petitioner's cannot withstand the trend. Since the filing of the prior proceeding in 1941, the population of the Nation's Capital increased by 400,000 with the Census Bureau estimating a further increase of 30% by 1952.

The foregoing leaves little doubt that the subject matter of this controversy, namely, the petitioner's locus in quo, is situated in the midst of an ever changing scene of which a limited forecast necessarily would be highly speculative. If we restrict the area to "physical changes in the neighborhood" as was done in the District Court, the result is the same according to the views of dissenting Judge of the Court of Appeals. Even the majority of the court finds difficulty in rejecting completely these views. Without knowledge of the aggregate of the alterations as of December, 1943, because they were never computed, the Court of Appeals says: " . . . we might be presently persuaded that the court in that earlier case erroneously found the facts or reached an erroneous conclusion . . . ". (R. 228). In dealing in this fashion with the sum of all of the changes in the neighborhood, the Court of Appeals concedes the vastness of these direct changes in the neighborhood. Neither the Court of Appeals, or anyone else, has been able to discern, with any degree of exactitude, the sum of the changes which occurred up to December, 1943, and those which have occurred since that time.

Moreover, in the *Sunnen* case, it is stated that oftentimes the absolute application results in genuine inequalities, discriminations, creating a "fertile basis for litigious confusion . . . ". All of these results flow from the Court of Appeals' refusal to follow a rationale. As the gravamen of the majority opinion is res judicata, and without the doctrine we must assume that the Court would have refused the injunction because of the many statements made therein

with respect to the harshness thereof,* it follows that the remaining frontages in this subdivision on Connecticut Avenue will escape the penalty of specific performance. The owners of the other frontages in Squares 1864, 1866 and 1867 will be in the same position of vantage that the Court in the *Sunnen* case attempted to avoid with respect to other taxpayers. Petitioner is confident that there is no substantial distinction in the two types of situations. Surely, the Collector of Taxes of the District of Columbia might feel sorely affected by a doctrine which prevents the erection of a $2,000,000 structure representing a source of public revenue of $50,000 per annum (R. 167), while authorizing similar usages to others not bound by the doctrine. This condition seems more appalling when it appears that the owner of the frontage in Square 1867 (vacant land) revels in its non-use in order to participate more fully in virtual monopolies inherent in his property holdings across the avenue (R. 47, 186, 211), a matter which the Municipality recognized administratively (R. 46).

CONCLUSIONS.

It is believed that the foregoing clearly demonstrates that the decision of the Court of Appeals is contrary to pertinent principles of law established by decisions of this Court. It is earnestly urged, in the interests of uniformity in the application of the doctrine of res judicata throughout the circuits, and for uniformity of decisions of the different panels of the Court of Appeals, if not the panel itself, that this Court entertain a review of this case on writ of certiorari.

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Attorneys for Petitioner.

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* In the celebrated case entitled *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 311, 41 Am. Rep. 365 (1881): ". . . though the contract was fair and just when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff . . .". Also, *Jackson* v. *Stevenson*, 31 N. E. 691, 156 Mass. 496, cited with approval in *City* v. *Dickey Mfg. Company*, 289 U. S. 334, 77 L. Ed. 1208, 53 S. Ct. 602, *supra*.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 153.

SAINT LO CONSTRUCTION COMPANY, INC., A Corporation,
Petitioner,

v.

LAWRENCE KOENIGSBERGER, ET AL., *Respondents.*

PETITIONER'S REPLY BRIEF.

A. The Statement of the Case Contained in Petition for Writ of Certiorari is Accurate for All Proper Puposes of These Proceedings.

At Page 2 of their brief, respondents state that the petitioner's Statement of the Case ". . . is replete with inaccurate statements concerning the proceedings below . . .". While the petitioner acknowledges that a respondent may find it necessary to supplement a given Statement of the Case in order to better support a selected legal argument, it nevertheless contends that it has never been the practice of this tribunal to receive reckless accusations impugning the character of members of this bar, merely because an

adversary prefers to be relieved of the slight effort incident to supplementing a Statement. Petitioner quite earnestly avers that its Statement wholly conforms with the factual statements in the opinions of the Court of Appeals. The very fact that the respondents have failed to specify where *any* inaccuracies appear would seem to indicate inexcusable recklessness. It is true petitioner did not include in the Statement several matters which relate to local features of the controversy. Strange as it may seem, when these local features were fully described in a brief filed in the Court of Appeals, respondents contended as follows: "The statement of facts presented in the brief . . . is based . . . largely on matters immaterial to this appeal . . .". In other words, the respondents there contended that the sole question in the Court of Appeals was res judicata, protesting that appellant's brief filed went far afield. Now, respondents find it convenient to supplement the Statement with local features to neutralize the res judicata aspect—contending that the case "involves merely the application of local law to a restrictive covenant affecting real estate in the District of Columbia." (Respondents' Brief, Page 9.)

B. Rule 52(a), Federal Rules of Civil Procedure, is Inextricably Involved in These Proceedings and in no Wise Imaginary.

The respondents, at Page 11, Respondents' Brief, argue that findings of fact under Rule 52(a), Federal Rules of Civil Procedure, are "clearly not essential to the conclusiveness of a judgment . . .". Several decisions of the circuit courts are mentioned by the respondents in support of their contention, but all of these cases, admittedly, turn on the point that the particular issues were sharp, single, and clear. By inference, if the issues were otherwise, respondents admit that findings of fact *are essential.* Such being the case, respondents' argument must be taken

as one in support of petitioner's application for certiorari, for in the prior Zarin proceeding, the issues *were not* sharp, single, or clear. In fact, the issues were so involved that District Judge Schweinhaut, at pre-trial, refused to estimate them in the absence of findings while Dissenting Circuit Judge Edgerton specifically ruled that they were susceptible of an interpretation entirely distinct from the views of the majority of the Court of Appeals. In other words, five jurists have examined these issues; three have agreed, and two have disagreed. Under respondents' theory, the prior judgment would have been reversed on direct appeal for failure to comply with Rule 52(a), *Smith* v. *Dental Products Co., infra.* Therefore compliance with Rule 52(a) was necessary to give validity to the general judgment of dismissal entered against petitioner's predecessor in title.

The respondents cannot therefore contend, as they do, that petitioner's arguments in that respect are "wholly imaginary". Surely, it is hoped that this same view was not deemed *imaginary* when Messrs. Koenigsberger, Fischer, and Panzer, as editors thereof, selected the following article for publication in Volume 2, Pages 733, 734, Federal Rules Service (Callaghan & Company):

> "This duty of making special findings of fact is mandatory, not discretionary. This follows from the terms of Rule 52 that special findings shall be made in *all* actions . . . tried without a jury . . . However, the failure to make a *particular* finding of fact ordinarily should not make the judgment *defective.* . . . Under the former federal practice if an action at law was tried without a jury, it was left to the discretion of the court whether the findings of fact should be general or special. . . ."

Respondents' views are repeated in Volume 5, Federal Rules Service, Page 840, where it is said ". . . fact finding is a serious responsibility and one which cannot adequately be discharged by mechanically adopting findings prepared

by counsel . . .''; and, once again, ''. . . The purpose of findings is to insure decision according to the evidence and the law and to *apprise the parties* . . . of the basis of the decision . . . .''. Volume 4, Page 936.

Petitioner nevertheless contends that fair compliance with Rule 52(a) is essential even in those cases were the issues are *clear*. It, therefore, urges that *Gill v. Gill*, 147 Fed. (2) 154, 79 U. S. App. D. C. 357, is in sharp conflict with the other circuits. *Smith* v. *Dental Products Co.*, 168 Fed. (2) 516, (CCA Ill.), *Brown* v. *Quinlan, Inc.*, 138 Fed. (2d) 228, (CCA Ill.). *Bowles* v. *Russell Packing Co.*, 140 Fed. (2) 354, (CCA Ill.), *Paramount Pest Control Service* v. *Brewer*, 170 Fed. (2) 553, (CCA Ore.). In fact, a sharp conflict exists within the judicial panels of the United States Court of Appeals of the District of Columbia Circuit. *National Savings & Trust Company* v. *Shutack*, 139 Fed. (2) 371, 78 U. S. App. D. C. 232; *Rainey* v. *Rainey*, 131 Fed. (2) 349, 76 U. S. App. D. C. 341; *Campbell* v. *Campbell* 170 Fed. (2) 809, —— U. S. App. D. C. ——, 11 Federal Rules Service, 785, where the court said: ''. . . the requirement that courts shall make findings of fact is far from a technicality. . .''.

In *Smith* v. *Dental Products Co., supra,* it was held that a general finding was not fair compliance with Rule 52(a), and the defect *was fatal*—not merely reversible error, citing circuit court decisions in support, thereof. Doubtless, the mandatory provisions set forth in Rule 52(a) do not differ in substantive features from those in the Tucker Act, 28 USCA, Section 764. In *Girard Trust Co.* v. *United States*, 149 Fed. (2) 872, (CCA—Pa.), the court held that findings of fact under the Tucker Act were mandatory, comparing these terms with Rule 52(a), Federal Rules of Civil Procedure, saying:

> ''. . . The absence of such findings in the case at bar defeats the judgment. . . .''.

Petitioner is not attempting to inject into these proceedings on certiorari a question which was not urged repeatedly in the courts below, nor, as respondents state, attempting to give flavor to these proceedings by injecting a point which had not been urged from the very beginning (R. 39, 58). In fact, the point of fair compliance with Rule 52(a) was injected into the case by the respondents, themselves, when the general finding in the former Zarin proceeding was first urged by them to deprive petitioner of procedural due process of law.

With this point inextricably involved in the plea of res judicata, it presents a matter of timely interest to both the bench, bar, and the Advisory Committee on Rules of Civil Procedure. Particularly, it is of interest to determine the extent to which this Court desires to apply the language contained in Rule 52(a), Federal Rules of Civil Procedure. It is quite doubtful if in the near future, the same nicety will develop for decision by our highest tribunal. Moreover, the controversy, f reviewed, will settle a number of rather vexing questions, namely:

(a) Are findings of facts and conclusions of law mandatory under the provisions of Rule 52(a), Federal Rules of Civil Procedure?

(b) Or, are such findings an informality in certain instances and mandatory in others, without definition of shadowy boundaries?

(c) Is a failure to make such findings a matter to be corrected only upon appeal, or may strangers in fact to the judgment demand the same degree of apprisement contemplated for an appellate body?

In discussing the fatal defect in the prior judgment which resulted from a failure to comply with Rule 52(a), petitioner does not recede from the position which is assumed in its Brief in Support of Certiorari, namely, that even before the adoption of Rule 52(a), Federal Rules of Civil Procedure, the prior Zarin judgment was not such an ad-

judication which would warrant a denial of the right to a full defense, *Hansberry* v. *Lee*, 311 U. S. 115. In other words, petitioner adheres to arguments set forth in its brief that the prior litigation did not determine any of the issues which were subsequently before the District Court in these proceedings. It does, however, say that failure to comply with Rule 52(a), Federal Rules of Civil Procedure, merely emphasizes the proposition, and brings to light the very wrong which the Advisory Committee thought it had provided against.

C. The Contention That Petitioner Consented to a Deprivation of Procedural Due Process is Wholly Without Merit and not Supported by the Record or by the Opinion of the Court of Appeals.

To escape fatal consequences following denial to petitioner of procedural due process, respondents attempt to fortify a certain mistaken contention of the District Judge in regard to a stipulation allegedly made by petitioner while defending the case in the trial court. This action of the District Judge occurred on the third day of trial when it became quite evident to witnesses, attaches and spectators that petitioner was suffering from a deprivation of procedural privileges (R. 144, 145). A brief review of the transcript of record on certiorari will show beyond doubt that petitioner refused to accept this contention, advising the court that it preferred to rely upon the reporter's transcript of testimony (R. 145). In this connection it is interesting to note that respondents refuse to contest the basic point of procedural due process fully developed in Brief In Support. See authorities at pp. 24, et seq. Rather, respondents prefer to seek support for the mistaken views of the District Judge. Respondents' methods in support of this alleged stipulation seem to expose its entire lack of merit. By purposeful deletion, together with the specific disengagements of the text of the colloquy, respondents have placed in their Statement of the Case what

to them purports to be by a stipulation. It is then argued that petitioner consented to be bound by the District Judge's action limiting petitioner's privilege of a full defense. Without these deletions, respondents made the same contention before the Court of Appeals. It was wholly rejected. Respondents before this Court present the same contention, but find it necessary to purposely delete portions of the text. At Page 7, Respondents' Brief, the following excerpt appears:

> The Court: That is just where Mr. Fischer stands. He says you must proceed in the first instance by showing a change since the judgment of June 14, 1944.
> Mr. Keane: I agree with that. I have no contest with that point.

The full text of the colloquy which, parenthetically, was a mere oral argument about the applicability of a rule in *Hurd* v. *Albert*, 214 Cal. 15, 3 P (2) 545, and one of several legal propositions considered by the court*, is as follows:

> Mr. Keane: I agree with that. I have no contest with that point. That is why Justice Schweinhaut said, "There are no findings." *Therefore, it cannot be on that basis.* We do not know what they were at that time. In the very language of Justice Schweinhaut, we do not know." (Italics supplied)

Within the full colloquy which is clearly incapable of conversion, by speciosity, or otherwise, petitioner's counsel strongly urged that res judicata was not to be applied in any degree because the former action was entirely different from the pending proceeding (R. 60). In fact, petitioner's counsel actually read to the court the very same

* Respondents competely overlook the distinction between a mere argument upon a legal point and a formal stipulation. Rule 17, Rules of the United States District Court for the District of Columbia provides: "A stipulation in an action will not be considered by the court unless the same be in a writing signed by the party to be bound thereby or his attorney; or made before the court or a master at a hearing stenographically reported. . .".

decision upon which it here relies on certiorari, namely, *Fidelity Title and Trust Company* v. *Lomos and Nettleton Company*, —— Conn. ——, 5A (2) 700 (R. 60). It is useless for respondents to argue that petitioner waived this contention. No advocate could have urged it more emphatically. Respondent's contention seems more faulty when it clearly appears that six weeks previously petitioner's counsel filed a thirty page brief with the pre-trial judge in support of its definite contention. The pre-trial judge ruled with the petitioner, filing an order completely rejecting any application of res judicata (R. 37).

Petitioner frankly admits that at trial commencement it did enter into a limited stipulation, but to the following extent (R. 61):

> The Court: Now, if I understand your position, you admit the existence of the covenant?
> Mr. Keane: I admit it, yes, sir.
> The Court: If I understand you, you would agree that the plaintiffs should have the relief here asked unless you are able to establish the defense?
> Mr. Keane: Yes, sir.
> The Court: Which you have?
> Mr. Keane: I will assume the entire burden of proceeding on the basis that it would create an equitable thought in your Honor's mind.

The above merely confirmed the stipulation made in the pre-trial order (R. 40). It was to relieve the respondents, as plaintiffs, from the arduous task of obtaining proofs of these 40 year old covenants. It did not extend any further, nor did it constitute a waiver by petitioner of proofs; but, on the contrary, expressly reserved to the petitioner a full equitable defense*. It is unfortunate that the District

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* The record is clear that subsequent to the colloquy mentioned in respondent's brief, counsel for respondent, Mr. Fischer, realized that he had failed to prevail—at least for the moment. At this point, we find Mr. Fischer insisting (R. 61) upon the right to certain proofs in chief before the petitioner undertook the burden of proceedings. There is little doubt as to Mr. Fischer's interpreta-

Judge, because of preoccupation with the manifold duties of a presiding arbiter in a lengthy and detailed proceeding, became unmindful of the true extent of petitioner's earlier stipulation. It would have been far better to have left the controversy in its original position; i.e., a direct application by the District Judge of res judicata with petitioner's direct objection left un-smirched rather than, without due reflection upon its true existence, to have injected a collateral matter to confuse petitioner's statutory privilege of appellate review. Thusly injected, it truly tempts an aggressive adversary to interfuse texture in abortive attempts to give it some semblance of reality.

CONCLUSION.

The brief filed herein by the respondents fails to adequately answer petitioner's contention that the Court of Appeals' majority opinion improperly applied res judicata to deny the petitioner the privilege of defending its property rights. Certiorari should be granted and the Court of Appeals ordered to remand the case for further proceedings.

Respectfully Submitted,

GEORGE E. ALLEN,
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tion of the prior colloquy which he now attempts to endow with a different meaning. On Page 9, Brief of Respondents In Opposition, counsel for the respondents even find it necessary to resort to the phrase "All right, Your Honor", to reach their desired objective. This, of course, was but a courteous reply to a very gentle and courteous jurist. Surely, courtesy should not be turned into a weapon. Petitioner theretofore had amply fulfilled the requirements of Rule 46, F. R. C. P. by informing the District Judge of its contention. There was no need to continue the debate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 153.

SAINT LO CONSTRUCTION COMPANY, INC., A Corporation,
Petitioner,

v.

LAWRENCE KOENIGSBERGER, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The findings of fact, conclusions of law and opinion of the U. S. District Court for District of Columbia are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 174 F. (2d) 25 (1949).

JURISDICTION.

Petitioner invoked the jurisdiction of this Court by filing a petition for a writ of certiorari pursuant to the provisions of 28 U. S. C., Sec. 1254.

STATEMENT OF THE CASE.

The statement of facts set out in the petition is so replete with inaccurate statements concerning the proceeding below, and on the other hand, omits so many facts relevant and material here, that a recasting of the statement seems essential in order to bring to light the simple issues presented for consideration.

The matter at hand concerns a covenant against apartment houses and stores in the subdivision known as "Chevy Chase, D. C." (R. 52).

Chevy Chase, D. C. is a subdivision in Washington, D. C., consisting of all the land in four squares with the exception of part of one lot which belongs to the District of Columbia. The subdivision is bounded by Morrison Street on the south, Connecticut Avenue on the west, Chevy Chase Circle on the north and Chevy Chase Parkway on the north and east (R. 52).

Since 1907, when the subdivision was created subject to the covenant above referred to, three efforts made to nullify the covenant have resulted in litigation prior to the present action—in 1919, in 1934 and 1943. In all three instances, the validity and enforceability of the very covenants involved in this action were sustained. *Chevy Chase Land Company* v. *Poole*, 48 App. D. C. 400 (1919); *Kenealy* v. *Chevy Chase Land Company*, 63 App. D. C. 327, 72 F. (2d) 378 (1934); *National Metropolitan Bank* v. *Zarin et al.*, Civil Action 12744 (D. C. 1944). Accordingly, the subdivision "Chevy Chase, D. C." is today an exclusively residential area containing no apartment houses or stores (R. 55).

The case of *National Metropolitan Bank* v. *Zarin et al.*, is highly relevant to the present action. The material allegations of the complaint in the case are as follows:

"(6) Since the establishment of said covenants, the conditions in the neighborhood thereby affected have radically changed, as is hereinafter set forth; that many of the defendants recognize that these changes have taken place and that it is now inequitable to enforce said covenants as to the plaintiff's property; that a number of the defendants have signed a paper writing consenting to the construction of an apartment house upon her property, a copy of which writing marked "Exhibit A", is hereto attached and made a part hereof.

"(7) At the time of the establishment of said covenants the neighborhood in question was distinctly suburban; it was a select residential section free of commercial enterprises and structures of any and every description. However, that part of the neighborhood facing Connecticut Avenue has undergone a complete change; immediately to the West of plaintiff's property is a bus terminal, and the Connecticut Avenue frontage of the three blocks lying to the South of said terminal are all used for commercial purposes; that apartment houses are now located along the Connecticut Avenue front of the two blocks lying to the South of said commercial area; that immediately to the South of the plaintiff's property is a large public school; that along the Connecticut Avenue front of the fourth square to the South of plaintiff's property there are a number of apartment houses. To the North of the plaintiff's property there are two large churches and an apartment house.

"The plaintiff's property has been and now is zoned Residential 60 "C", and under the Zoning Laws, and regulations passed pursuant thereto, can be used for apartment house purposes.

"(8) There is a great amount of automobile and bus traffic passing the plaintiff's property and this, with the other conditions herein enumerated, render her property entirely unsuitable for private residence purposes. The plaintiff has endeavored to rent or sell her property, but it unable to obtain a fair rental or fair

price for the property, as under present conditions, there is no demand for her property. Her home is large and costly to maintain; she is financially unable to maintain said property as it should be maintained and if the restrictions are continued the result will be that the property will be subject to tremendous deterioration, will become in a condition of great disrepair, will become a derelict and an eye sore to the community, which condition will tend to decrease the values of properties in this neighborhood.

"(9) The aforesaid covenants have heretofore been violated, in that in the said subdivision a school and a church have been constructed; that though the property upon which the aforesaid bus terminal was constructed is not within said subdivision, yet our Court of Appeals in the case of *Chevy Chase Land Company* v. *Poole*, 48 App. D. C., 400, held it was subject, as a matter of law, to said covenants for the benefit of said subdivision, and yet within the last year a bus terminal or station has been constructed upon said property. The defendants should now be estopped from enforcing said covenants as to the plaintiff's property."

The findings of fact made in the instant case in connection with the *National Metropolitan Bank* action are as follows (R. 53, 54):

"On September 5, 1941, Ellen T. McReynolds, then the owner of the property now owned by the defendant, as plaintiff, brought an action in this Court against all of the then other owners of property in Chevy Chase, D. C., including the plaintiffs and interveners herein or their predecessors in title, as defendants. The complaint in that action averred that since the establishment of the covenants set forth in Finding Number 5 hereof, the conditions in the neighborhood thereby affected had radically changed in many respects thereinafter recited. The prayers of the Complaint were (1) that the covenants hereinabove referred to be set aside, vacated or annulled as to the property now owned by the defendant hereto, (2) that the covenant providing that no apartment house shall be erected upon said property be set aside, vacated or annulled as to said property of the defendant hereto, (3) that the defen-

dants to that action be enjoined from interfering with the construction of an apartment house upon said property of the defendant hereto, (4) that a declaratory judgment be entered decreeing that said property of the defendant hereto is not subject to said covenants, or any of them, and (5) for general relief. Said former action was entitled 'Ellen T. McReynolds, Plaintiff, v. Jacob Zarin et al., Civil Action Number 12744'. While that action was pending the property of the defendant hereto was acquired by the National Metropolitan Bank and said Bank was thereupon substituted for McReynolds as plaintiff in that action. The averments of the complaint above referred to raise the precise question which has been brought before the court in the instant case and relate to the very property here in issue. The answers in Civil Action 12744 put that question dominently in issue. The pre-trial order in that case, signed by the attorneys for the plaintiffs and the defendants indicates that that issue was the only issue presented to the court. It recites as follows:

'Plaintiff claims to be the owner of certain lots in the District of Columbia which are part of a subdivision, and that it is entitled to have the restrictive covenant set aside because of changes in the neighborhood and because of change in the use of properties in the neighborhood, because it would be inequitable to enforce the covenant because of such change.'

That action was thereafter tried before Justice Bailey of this Court, without a jury, on its merits, on testimony taken in open court. That trial was concluded in December, 1943, and a judgment dismissing the complaint was signed by Justice Bailey on June 14, 1944. The record does not disclose that Justice Bailey made any findings of fact or entered any conclusions of law; the issue above referred to, however, was necessarily presented in the pleadings of the case and the only real controversy in National Metropolitan Bank v. Zarin was as to what changes had occurred and whether or not such changes were sufficient to cause the Court to believe it would be inequitable to enforce the covenants."

Nine months after the entry of judgment in the *National Metropolitan Bank* case, the petitioner, a new Delaware corporation, contracted to purchase the property which was the subject of that action with full knowledge of the covenants, the proceedings in Civil Action 12744, the history of prior litigation and the physical condition of the property and surrounding properties (R. 42). The petitioner's acknowledged purpose in purchasing the property was to erect an apartment house and stores. The purchase price was $68,000, of which petitioner paid $1,000 in cash and gave its note, secured by deed of trust for the other $67,000 to a straw for the National Metropolitan Bank, plaintiff in the former case and petitioner's predecessor in title (R. 42, 54). On May 3, 1947, the petitioner announced that it intended to proceed with the construction of an apartment house and stores on the property (R. 22) and the action below was promptly instituted on May 8, 1947. (R. 2, 6.)

Respondents here (plaintiff and plaintiff interveners below) are property owners in "Chevy Chase, D. C." who sought to enforce the covenants. All interveners actually participating in the case (R. 51) supported the original plaintiffs.

In the present proceeding, the defense of the petitioner to the action for injunction was based upon alleged changes in the neighborhood between 1907 (the date of the creation of the subdivision) and 1947 (the date of the present action) which it was alleged made inequitable the enforcement of the covenants against it (R. 17-25). It has been the position of the respondents throughout these proceedings that the judgment in the *National Metropolitan Bank* case was res judicata of that issue in this proceeding so far as changes in the neighborhood prior to the time of the trial of that action affected the validity and enforceability of the covenant and that accordingly the burden was upon the petitioner to establish some material change in the neighborhood since the time of the trial of the former case in December, 1943, before the petitioner could go behind

the judgment in the former case to show the cumulative effect of all the changes between the time of the creation of the subdivision and the institution of the present action. The respondents pointed out below that, if this were not the case, the petitioner would merely be retrying exactly the same case disposed of after a two-week trial in 1943. On the opening statement on behalf of petitioner in the trial court, after its counsel had explained the case of *Hurd* v. *Albert*, 214 Cal. 15, 3 P. (2d) 545 (1931), the following colloquy took place betwen the court and counsel for petitioner (R. 58):

> By Mr. Keane: * * *
>
> The Court further said that the doctrine of res judicata was never intended to operate so as to prevent a re-examination of the same question between the same parties, where in the interval between the first and second occasions the facts have materially changed, or new facts have occurred which may affect the legal rights of the litigants.
>
> The Court: That is just where Mr. Fischer stands. He says you must proceed in the first instance by showing a change since the judgment of June 14, 1944.
>
> Mr. Keane: I agree with that. I have no contest with that point . . .

And at a later point (R. 60-62):

> The Court: When did the defendant acquire this property?
>
> Mr. Keane: He acquired the property in April—he acquired it in December, 1945, just two years after the previous litigation.
>
> The Court: With knowledge of the covenant?
>
> Mr. Keane: Yes sir.
>
> The Court: And with knowledge of the judgment entered by Judge Bailey in June, 1944?
>
> Mr. Keane: Well, I will answer that in this way: He came to me for advice. I wanted to look at the decision. I found no allegations in the bill, and I so advised him, so he did it with knowledge.
>
> The Court: Now, if I understand your position, you admit the existence of the covenant?

Mr. Keane: I admit it, yes, sir.

The Court: If I understand you, you would agree that the plaintiffs should have the relief here asked unless you are able to establish the defense?

Mr. Keane: Yes, sir.

The Court: Which you have?

Mr. Keane: I will assume the entire burden of proceeding, on the basis that it would create an equitable thought in Your Honor's mind.

The Court: That would mean that you would have the burden of establishing one of your contentions, otherwise the plaintiffs would be entitled to the relief asked?

Mr. Keane: Yes, sir; the entire burden of proceeding is on this defendant, Your Honor.

The Court: That will mean that you will proceed with your witnesses?

Mr. Keane: Yes, Your Honor.

* * *

Mr. Keane: Your Honor, I will have my first witness available, whenever Your Honor indicates.

The Court: At 1:30. I will limit the testimony, for the present, to changes in the neighborhood since June 14, 1944.

Mr. Keane: To facilitate the defense, Your Honor, the trial took place in December, 1943.

The Court: Was not the judgment in June, 1944?

Mr. Keane: But it was nunc pro tunc. The witnesses in 1943 must have testified to what existed at that time.

The Court: When was it submitted to Judge Bailey?

Mr. Keane: In December, 1943, was it not?

Mr. Fischer: The trial was closed and submitted to Judge Bailey in December, 1943. The judgment was signed and entered on June 14, 1944.

The Court: I think perhaps it would be better to go back to the first day of December, 1943, and that will be—

Mr. Keane: Your Honor, I hate to press the point, but would this be agreeable to the Court: We are going to have the testimony transcribed and made available to Your Honor. Some of the witnesses will testify from 1908 to 1943. I will certainly make every effort

to hold them to the time as of 1943, but rather than recall witnesses, if Your Honor happens to feel that it should be available, could not Your Honor separate it in our final arguments? It is only a question of one or two witnesses.

The Court: No, I think I would rather make it definite; and if later on you are privileged to open up the earlier years, you may recall the witnesses.

Mr. Keane: All right, Your Honor.

Counsel for petitioner did not object to the ruling of the trial judge after the opening statements; he did not claim that the ruling of the trial judge placed him at a disadvantage in presenting his defense; and he did not ask for a continuance.

After three days of trial, in which counsel for petitioner attempted to meet the burden which was properly his and which he had assumed in his opening statement, respondents moved for judgment on the ground that petitioner had failed to sustain that burden. The motion was granted and the ruling was accompanied by the oral opinion set out in the record at page 215. This judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit (R. 225), 174 F. (2d) 25.

ARGUMENT.

None of the reasons which ordinarily are considered by this Court to justify the grant of certiorari exists in this case, which involves merely the application of local law to a restrictive covenant affecting real estate in the District of Columbia—devoid of any federal, constitutional or statutory aspects, and wholly lacking in questions of federal or other public interest.

In an effort to impart to its application the flavor of a federal question, petitioner stresses the contention that the trial court and the Court of Appeals misconstrued rule 52(a), F.R.C.P., in applying the doctrine of res judicata or collateral estoppel to the judgment entered in previous litigation between the same parties (or their privies) in

which the trial court, after trial without a jury, had omitted to find the facts separately, as required by that rule. It is petitioner's contention that without such findings, the former judgment cannot give rise to either doctrine.

It has never been the law that findings of fact were essential to the conclusiveness of a judgment, else no judgment entered on the general verdict of a jury could ever have had that quality. Prior to 1930, there was neither federal statute nor rule of court which required such findings in either jury or non-jury cases. In *Railroad Commission* v. *Maxcy*, 281 U. S. 82, 74 L. Ed. 717, this Court pointed out the importance of findings of fact in order to enable appellate courts to understand the basis of the decision to be reviewed. That case was decided on March 12, 1930, and on June 2, 1930, this Court amended the Federal Equity Rules by adding rule 70-1/2 (effective October 1, 1930), 281 U. S. 773. That rule required findings of fact in equity cases, and their inclusion in the record on appeal. It is fair to assume that the purpose of this Court in the promulgation of the rule was to correct the unsatisfactory situation illustrated by *Railroad Commission* v. *Maxcy*.

The substance of rule 70-1/2 was embodied in rules 52(a) and 75(g), F.R.C.P. The purpose of both rules was to improve and facilitate appellate review. It was so stated in the note of the Advisory Committee commenting on the rule, and it has been so held in a numbe. of decisions, including *Interstate Circuit* v. *United States*, 304 U. S. 55, 56, 82 L. Ed. 1146 (1936); *United States* v. *Forness*, 125 F. (2d) 928, 942 (C.C.A. 2d, 1942); *Goodacre* v. *Panagopoulos*, 110 F. (2d) 716, 72 App. D. C. 25 (1940); *Hurwitz* v. *Hurwitz*, 136 F. (2d) 796, 78 App. D. C. 66 (1943).

In the report of the Advisory Committee accompanying the proposed 1948 amendment of rule 52(a), it is stated that findings of fact "not only aid the appellate court on review, *but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment*" (emphasis supplied). The italicized phrase did not accompany the rule as originally promulgated, and it

was not germane to the 1948 amendment, which only amended the rule so as to provide that it should be applicable to cases tried with an advisory jury, that it should be sufficient if the findings of fact and conclusions of law appear in the opinion or memorandum of decision, if any, and that such findings were unnecessary on decisions of certain motions.

Since the adoption of rule 52, the decisions of the courts have been clear that findings of fact are not even essential for the purposes of appeal and a case will not be remanded for such findings where the record is clear. *Woodruff* v. *Heiser,* 150 F. (2d) 869 (C.C.A. 10th, 1945); *Burman* v. *Lenkin Construction Co.,* 149 F. (2d) 827, 80 App. D. C. 125 (1945); *Rossiter* v. *Vogel,* 148 F. (2d) 292 (C.C.A. 2d, 1945); *Hurwitz* v. *Hurwitz,* 136 F. (2d) 796, 78 App. D. C. 66 (1943); *Goodacre* v. *Panagopoulos,* 110 F. (2d) 716, 72 App. D. C. 25 (1940). Since the adoption of rule 52, it has also been held that the parties may waive findings of fact if an appeal is not taken. *United States* v. *Institute of Carpet Manufacturers of America, Inc.,* 4 F. R. Serv. 52a.16, Case 3, 1 F.R.D. 636 (D.C.S.D.N.Y. 1941). And since the adoption of rule 52, it has been held that findings of fact are clearly not essential to the conclusiveness of a judgment for the purposes of the doctrine of res judicata or collateral estoppel. *Gill* v. *Gill,* 147 F. (2d) 154, 79 App. D. C. 357 (1945).

In this background, the most that can be said is that such findings might under some circumstances be of assistance in the application of the doctrines of res judicata and estoppel by judgment—not that they are indispensible thereto. In the instant case, they are not even a factor, because neither findings of fact nor evidence aliunde the record are required to make crystal clear the issues of fact involved and the scope of the decision of the former litigation. The trial judge in the instant case made detailed findings of fact on the matter leaving no doubt that the record of the former action was clear for this purpose, and the opinions

in the Court of Appeals are in full agreement as to the facts which were determined in the former action. The attempt of the petitioner to make it appear that disagreement existed in the court below on this point is entirely misdirected. Indeed, the purport of that litigation was so clear that the petitioner's predecessor in title neither requested findings nor appealed.

Accordingly, the federal question which the petitioner attempts to raise involving the interpretation of rule 52(a), F.R.C.P., is wholly imaginary. Likewise, the federal question the petitioner seeks to raise under rule 16, F.R.C.P. is frivolous, for the views held by a pre-trial judge are surely not binding upon a Court of Appeals reviewing on the merits the determination of the trial judge. *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152 (1911). What the petitioner here really asks is a review of the findings of fact of the trial judge in a case involving only local real estate law where these findings have already been examined and affirmed under the applicable local law by the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION.

The decision below is correct and presents no federal question of importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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